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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS ANTONIO CONTRERAS, Defendant and Appellant.	F062656 (Super. Ct. No. 1421268) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Scott T. Steffen, Judge.

Julia Freis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Kathleen A. McKenna, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Cornell, Acting P.J., Gomes, J. and Franson, J.

A jury convicted Luis Antonio Contreras and his codefendant, Ralph Talbert Meyer, of burglary. (Pen. Code, § 459.)[1] Contreras was sentenced to a term of four years in prison. Contreras argues the trial court erroneously denied his motion pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). In a related appeal, Meyer makes the same argument. (*People v. Meyer* (June 15, 2012, F062337) [nonpub. opn.].) We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The information charged Contreras with one count of burglary. The information also alleged that a person other than an accomplice was home at the time of the burglary within the meaning of section 667.5, subdivision (c)(21). As the evidence supporting the conviction is not relevant to the issues on appeal, only a short summary will be provided.

Isaiah Rios was asleep in his house when a loud noise emanating from the kitchen area woke him. When he went to investigate, he saw two men run out of the house through the door leading into the garage and then out through the garage. He could not identify the perpetrators. It appeared they had kicked open the door from the garage into the house.

While on his early morning bicycle ride, Mark Fife observed Contreras and Meyer (collectively, defendants) sitting on a bench in the park. Fife noticed them because he often was in the area at that time of the morning and it was unusual to see anyone. About 15 minutes later he saw the men a second time, this time on the street on which Rios lived. When Fife looked back, he saw the men looking over the fence, which looked suspicious to Fife. Fife turned around and saw the men disappear behind the fence.

Fife felt the whole episode was suspicious. He did not have a cell phone, so he rode back to his house and then drove his vehicle back to the area. As he drove by the

[1]All further statutory references are to the Penal Code.

area in which he had last seen defendants, Fife saw them jump over a fence. Fife stopped his vehicle and both defendants ran right in front of his vehicle. As they passed, each looked directly at Fife. Fife attempted to follow defendants and called the emergency number for assistance.

Fife identified defendants later that morning after the police placed them in custody.

The jury found Contreras and Meyer guilty. Contreras was sentenced to a prison term of four years.

DISCUSSION

The only issue is whether the trial court erred when it denied Contreras's *Wheeler* motion, which asserted the prosecution used its peremptory challenges in violation of Contreras's constitutional rights as explained in *Batson, supra,* 476 U.S. 79 and *Wheeler, supra,* 22 Cal.3d 258. Since Contreras's arguments are similar to those made by Meyer, we adopt the majority of our analysis from Meyer's appeal and repeat it here.

We begin with the relevant law.

Applicable Law

"An advocate's jury selection decisions remain a discretionary prerogative, but race-based decisions are not constitutionally tolerable. [Citation.] Both court and counsel bear responsibility for creating a record that allows for meaningful review. [Citations.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 621 (*Lenix*).)

The three-step analysis the trial court must follow in analyzing a *Batson/Wheeler* objection is well established. In the first step, the defendant, asserting the prosecutor engaged in discriminatory use of peremptory challenges, assumes the burden of establishing a prima facie case of discrimination. (*People v. McDermott* (2002) 28 Cal.4th 946, 970 (*McDermott*).) A prima facie case is established when the defendant raises a reasonable inference that the prosecutor has challenged potential jurors because of their race or other group association. (*Ibid*.)

If the trial court concludes a prima facie case has been established by the moving party, it proceeds to the second step of the analysis and asks the prosecutor, who bears the burden of proof, for a race- or group-neutral explanation for the peremptory challenges. (*McDermott, supra*, 28 Cal.4th at p. 970.) "When reasons are given for the exercise of challenges, an advocate must 'stand or fall on the plausibility of the reasons he gives.' [Citation.] The plausibility of those reasons will be reviewed, but not reweighed, in light of the entire record. [Citation.]" (*Lenix, supra,* 44 Cal.4th at p. 621.)

The third step of the analysis requires the trial court to determine if the defendant has proven purposeful racial discrimination. (*McDermott, supra*, 28 Cal.4th at p. 971.) "[T]he court in *Miller-El* [*v. Dretke* (2005) 545 U.S. 231] emphasized that it is the *trial court's* duty to 'assess the plausibility' of the prosecutor's proffered reasons for striking a potential juror 'in light of all evidence with a bearing on it.' [Citation.] The *Snyder* [*v. Louisiana* (2008) 552 U.S. 472] court stated that the trial court bears a 'pivotal role in evaluating *Batson* claims,' for the trial court must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge. [Citation.]" (*Lenix, supra,* 44 Cal.4th at p. 625.)

We review the trial court's finding to determine if it is supported by substantial evidence when the trial court has made a sincere and reasoned attempt to evaluate the reasons given by the prosecutor for the use of the peremptory challenges. (*McDermott, supra,* 28 Cal.4th at p. 971.) "Review is deferential to the factual findings of the trial court, but that review remains a meaningful one. As the high court described it, '"[d]eference does not by definition preclude relief."' [Citation.]" (*Lenix, supra*, 44 Cal.4th at p. 621.) We are required to examine all relevant circumstances when conducting our analysis. (*Id.* at p. 626.) We presume the prosecutor used the peremptory challenges in a constitutional manner and "defer to the trial court's ability 'to distinguish

bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' [Citation.]" (*Ibid*.)

Relevant Circumstances

We now turn to the circumstances relevant to Contreras's objection. The voir dire of the jury primarily was conducted by the trial court. The prosecutor asked general group questions of the entire panel and followed up if anyone responded affirmatively. In addition, the prosecutor followed up on some of the potential jurors' responses to the trial court's questions. The prosecutor's voir dire of the first panel of 22 jurors consisted of 11 pages in the reporter's transcript. The prosecutor's voir dire of the next 11 jurors consisted of two pages in the reporter's transcript.

The final panel consisted of five women and seven men. Three jurors had Hispanic surnames.

Batson/Wheeler *Motion*

The prosecutor exercised eight peremptory challenges. Meyer's objection related to three of the last four challenges, which were utilized on Prospective Jurors G.G., A.H., and R.M. Trial counsel argued that these peremptory challenges were to two Hispanic individuals and to one Southeast Asian individual. Contreras joined in Meyer's motion and arguments. The trial court expressed doubt about whether a prima facie case of discrimination had been established, but requested the prosecutor provide explanations for the challenges.

The prosecutor explained that R.M. stated she previously had served on a jury. When asked whether it was a civil or criminal trial, she responded, "they want to put him in jail," but she did not know what crime had been charged. The prosecutor stated, in essence, that her statement caused him great concern because it suggested a bias toward defendants.

The prosecutor felt that A.H. appeared confused in the courtroom, proceeding to the wrong chair, and was very young. In addition, the prosecutor had difficulty in understanding one of his answers.

G.G., the prosecutor explained, exhibited an attitude of annoyance or irritation throughout the proceedings.

Meyer's trial counsel asserted that he did not observe G.G. exhibit an attitude and argued that A.H. did not appear confused. He attempted to explain R.M.'s responses by asserting that it was unfair to interpret her responses as suggesting "the defendant" was "the victim." Contreras again joined in these comments.

The trial court explained that in its opinion R.M. did not appear to have a good understanding of the proceedings, and the trial court appeared concerned about her ability to serve as a juror. A.H. also appeared to have little understanding of the proceedings and was not very clear with his answers. The trial court felt he was not "fully engaged in the process." Finally, with respect to G.G., the trial court also noted an attitude of annoyance in his body language throughout the proceedings. Accordingly, the trial court denied the motion.

Analysis

The parties agree that because the trial court asked the prosecutor to justify the use of his peremptory challenges, we must proceed to an analysis of the prosecutor's stated reasons. In this situation, we infer the trial court found that the defense presented a prima facie case of discriminatory intent, "and the only question remaining is whether the individual justifications were adequate. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 135.)

Accordingly, we turn to the individual justifications of the prosecutor for the challenges.

The prosecutor asserted that Prospective Juror G.G. exhibited an attitude of annoyance or irritation. He did not respond to any of the group questions and provided

minimal information about himself. Neither attorney addressed any voir dire questions to him. The trial court, however, agreed with the prosecutor that G.G.'s body language exhibited an obvious sense of annoyance with the proceedings.

This argument is an ideal example of why we give deference to trial courts' factual findings. "'In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." [Citations.]' [Citation.]" (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 (*Miller-El*).) In addition, "Experienced trial lawyers recognize what has been borne out by common experience over the centuries. There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." (*Lenix, supra,* 44 Cal.4th at p. 622.) Accordingly, on direct review the trial court's factual findings are accorded great deference and will not be overturned unless clearly erroneous. (*Miller-El,* at p. 340.)

There is no evidence to suggest the trial court erred when it concluded that Prospective Juror G.G. exhibited annoyance with the proceedings and therefore would not be a good juror. Since the prosecutor's stated reason is unrelated to G.G.'s race, the peremptory challenge to him did not violate Contreras's right to equal protection.

We reach the same conclusion regarding Prospective Juror A.H. He did not respond to any of the group questions. He stated, "My occupation is I go to school, MJC." He did not have a major and was taking "basic classes for now." Neither attorney asked him any voir dire questions.

The prosecutor stated he found A.H. to be very young, a statement we understand to mean immature. In addition, the prosecutor stated he had difficulty understanding one of A.H.'s answers to the standard questions. The trial court agreed that A.H. was young and did not appear to be involved in the process. Again, we understand this statement to mean that A.H. was immature. The trial court agreed that it was difficult to understand his answers to some of the questions. We also note that A.H. failed to state if he had any children, which suggests he failed to follow the trial court's instructions.

While defense counsel disagreed with the prosecutor and the trial court, there is no evidence that the trial court's findings were incorrect. Contreras urges us to reach a contrary conclusion without providing any supporting evidence, which we will not do. Since youth is a valid, nondiscriminatory ground for excusing a juror (*People v. Sims* (1993) 5 Cal.4th 405, 429-430; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328), Contreras's right to equal protection was not violated.

The final juror identified by Meyer is Prospective Juror R.M. She stated she had served as a juror in a criminal trial. When asked about the charges, she stated, "Jail. I don't remember exactly, but it -- they want to put him in jail for -- I don't remember." When asked if the jury had reached a verdict, R.M. stated, "I left before they finished. [¶] Like them that left today." She then admitted she did not actually serve on the jury. She also informed the trial court about her marital status and her children, but did not provide any information about her occupation. Neither attorney asked R.M. any voir dire questions.

The prosecutor explained that R.M.'s statement, "they want to put him in jail," suggested to him that she favored the defense and would impose a greater burden on the prosecution than the law required. The trial court concluded R.M. did not appear to have a good understanding of the proceedings, which caused the court concern about her ability to serve as a juror.

As stated above, R.M. made the statement the prosecutor attributed to her. Moreover, it was not unreasonable for the prosecutor to be concerned that the answer would cause R.M. to favor the defense. Her response suggested that she viewed the proceedings as a "David v. Goliath" situation, with the defendant being the overmatched victim of prosecutorial zeal. The trial court found the prosecutor's concern justified and this finding was amply supported by the record.

Contreras's Arguments

Contreras makes numerous arguments, many of which are closely related. In looking at his whole brief, we understand him to be suggesting that a trial court has a sua sponte duty to undertake a detailed investigation into allegations that a prosecutor has used peremptory challenges for an impermissible purpose. For example, Contreras argues the trial court was obligated to perform a statistical (e.g., compare the number of Hispanic jurors excused versus the number on the panel) and comparative analysis (e.g., compare answers to questions of excused minority jurors versus answers to questions of nonminority jurors remaining on the panel), even if the defendant does not make the argument. According to Contreras, the failure to perform such analysis renders the trial court's efforts less than sincere and reasoned, and we are required to perform a de novo review of the entire proceeding.

As we shall explain, while statistical and comparative analyses are tools that can be used by the trial court and the appellate courts, no authority suggests the trial court has a sua sponte duty to conduct such analyses in the first instance when the issue is never raised by the moving party. Nor are we inclined to impose such a requirement on the trial court.

As we have already explained, it is the defendant's burden to create a record suitable for review. If the defendant feels that a statistical or comparative analysis supports his argument, it is the defendant's obligation to present it to the trial court so it can be considered.

The trial court's obligation is to make a sincere and reasoned effort to analyze the prosecutor's stated reasons for exercising peremptory challenges to ensure they are race neutral, taking into consideration all of the circumstances before it, including the defendant's arguments.

There are cases in which appellate courts have utilized statistical and comparative analyses as a tool when examining a prosecutor's use of peremptory challenges. For example, in *Snyder v. Louisiana, supra,* 552 U.S. 472, the Supreme Court compared the stated reason for utilizing a peremptory challenge on a Black juror (concern that the juror's time constraints would result in a verdict based on expediency rather than the evidence) to two White jurors who also expressed significant time constraints but were accepted by the prosecution. Since the three jurors were similarly situated, the Supreme Court concluded the reason proffered by the prosecution was pretextual and found purposeful discrimination. (*Id*. at pp. 483-486.)

The Supreme Court used a statistical analysis in *Miller-El, supra,* 537 U.S. 322. "A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury." (*Id.* at p. 331.)

The Supreme Court, however, noted that while a statistical analysis was relevant in that case, it was "not petitioner's whole case." (*Miller-El, supra,* 537 U.S. at p. 331.) The defendant also presented evidence the prosecutor significantly altered the manner in which Black jurors were examined on the death penalty and their willingness to impose

the minimum sentence under Texas law. White jurors were examined much less vigorously. (*Id*. at pp. 332-333.) Evidence of procedural abuses by the prosecutor also was demonstrated by the defendant. (*Id*. at pp. 333-334.) Finally, evidence of the pattern and practice of the prosecutor's office in basing peremptory challenges on race also was presented. (*Id.* at pp. 334-335.)

While comparative and statistical analyses may be useful, their usefulness is limited when presented for the first time on appeal. These limitations were discussed extensively by the Supreme Court in *Lenix*. (*Lenix, supra,* 44 Cal.4th at pp. 622-628.) We need not repeat this exhaustive analysis here, but note the Supreme Court identified the following difficulties when attempting a comparative analysis for the first time on appeal: (1) comparative analysis is one form of relevant circumstantial evidence of discrimination, but is not necessarily dispositive (*id*. at p. 622); (2) there is more to human communication than language and challenges often are based on something other than the words spoken (*ibid*.); (3) the prosecutor never is given the opportunity to defend his challenge to one juror and not another juror who appears to give similar answers, but whose "body language" may have revealed significant differences between the two (*id*. at p. 623); (4) the prosecutor's analysis of the jury panel changes as new jurors join the panel (*ibid*.); and (5) the final composition of the panel may influence a decision to challenge a specific juror, i.e., a type of juror not acceptable earlier in the proceedings may be deemed acceptable on the final panel (*ibid.*). In short, "the complexity of human nature[] make[s] a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Id*. at p. 624.)

The Supreme Court concluded that "comparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard." (*Lenix, supra*, 44 Cal.4th at p. 624.) Despite these limitations, "evidence of comparative juror analysis

must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id*. at p. 622.)

We now turn to Contreras's arguments, first noting the extremely limited record before us. Contreras argues that a comparison of some of the jurors left on the panel with those excused establishes that the prosecutor impermissibly was basing his peremptory challenges on the jurors' races. We disagree.

One reason stated by the prosecutor for striking Prospective Juror A.H. was that he had trouble finding his seat in the jury box. Contreras argues that Juror Nos. 1, 3, 8, and 9 also had trouble finding their seats, but were left on the jury by the prosecutor. The trial court rejected this alleged justification for excusing A.H., and so do we. Moreover, the two situations are not similar enough to permit a comparison. Juror Nos. 1, 3, and 9 were part of the first 22 jurors called, and the trial court was instructing all of them where to sit. Juror No. 8 was told to sit in seat No. 8 when the entire box was empty because all of the jurors had been instructed to leave the courtroom so the trial court could hear the *Wheeler* motion. A.H., on the other hand, was merely filling a seat vacated by the last excused juror. It is likely that A.H.'s inability to locate the proper seat was due to his failure to pay attention to the proceedings, while the same cannot be said of the other jurors. This attempted comparison fails for lack of similarity.

Contreras next points out that while Prospective Juror R.M. could not recall the particulars of her prior jury service, there also were other jurors left on the panel that suffered the same lack or recollection. This argument does not aid Contreras because it is not the reason the prosecutor relied on for utilizing a peremptory challenge on R.M. Nor did the trial court assign any significance to the lack of recollection. The lack of recollection is irrelevant.

Nor does the assertion that Juror No. 1 was confused aid Contreras. Contreras asserts that because Juror No. 1 had difficulty turning off his newly acquired cell phone,

he must have been confused. We find it impossible to compare confusion in legal proceedings to use of a cell phone.

Contreras next argues that Juror No. 4 also must have been young because of the information she provided, and she must not have been involved in the proceedings because she asked how long the trial would last because school was beginning soon. We interpret the prosecutor's objection to A.H. as one based on immaturity. The prosecutor admitted there were other young people on the panel and stated he would not use a peremptory challenge on them. Instead, his concern was A.H.'s lack of maturity, which, as we explained above, is a race-neutral reason for exercising a peremptory challenge. Nothing in the record suggests that Juror No. 4 was as immature as A.H., especially not the comments cited by Contreras.

Finally, Contreras argues that Juror No. 9, like Prospective Juror G.G., did not want to be on the jury. That is not what the record establishes. Juror No. 9 informed the trial court she was in a high-risk pregnancy and accommodation might be necessary if she were on the panel. This is a far cry from G.G., who, according to both the prosecutor and the trial court, demonstrated annoyance because he was required to be in court. A peremptory challenge used to excuse a juror who exhibits hostility to the proceedings through his body language is not one based on race.

Contreras next asserts the prosecutor's failure to ask any voir dire questions of Prospective Jurors G.G., A.H., and R.M. establishes his discriminatory intent. Factually, this assertion is not correct since the prosecutor asked all prospective jurors the same group questions. Moreover, as we pointed out earlier, voir dire was very limited by all parties in this case. The prosecutor asked very few direct questions of any juror unless he or she responded to a group question. Since many jurors, including G.G., A.H., and R.M., did not respond to a group question, we attach no significance to the prosecutor's failure to direct a specific question to any of them.

Similarly, we attach no significance to the trial court's asserted failure to consider the fact that Contreras apparently is Hispanic. From this record we cannot ascertain if the trial court attached any significance to this fact or why it should do so. The authority cited by Contreras does not require a specific observation by the trial court. Since Contreras did not raise this issue, the trial court was not required to address it.

Conclusion

The trial court responded appropriately to the arguments made by Meyer, which were adopted by Contreras, and the prosecutor's responses. It made a sincere and reasoned attempt to analyze the prosecutor's arguments. Since substantial evidence supports the trial court's findings, we find no error.

We also decline to impose on the trial court an obligation to perform a statistical or comparative analysis unless the defendant makes such an argument in the trial court.

DISPOSITION

The judgment is affirmed.